NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JAYONTAY THOMAS, Defendant and Appellant.	C084323 (Super. Ct. No. STKCRFE20160010729)

A jury found defendant Jayontay Thomas guilty of counts including first degree murder with special circumstances findings that the murder was committed during a burglary and attempted robbery. On appeal, defendant contends (1) insufficient evidence corroborated the testimony of a robbery accomplice, (2) insufficient evidence supported the special circumstances findings, and (3) the abstract must be corrected to remove an erroneous $1,000 surcharge. We will order a corrected abstract and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The murder occurred during an attempted home invasion robbery. Five people were involved in the robbery: defendant, defendant's brother, Arthur, Kenny, Ryan, and Tito (the accomplice). Tito testified for the prosecution as an accomplice witness.

The Accomplice

The accomplice pleaded guilty to manslaughter and would serve an 11-year sentence. As part of his plea agreement, he agreed to testify truthfully in defendant's case.

He testified he was close friends with Kenny and Ryan, who are brothers. He knew of defendant's brother, but did not know him personally. He could not recall when he met defendant—it may have been the day of the incident.

The day of the incident, the accomplice left work in the early afternoon and drove to San Pablo to hang out with Kenny. Defendant and defendant's brother were also there. At some point, the accomplice drove defendant, defendant's brother, Ryan, and Kenny to Manteca to buy marijuana.

In Manteca, they went to a McDonald's and then to a Bass Pro Shops. At the Bass Pro Shops, they posed for several photos that were later shown to the jury.[1] The photos included Kenny, Ryan, defendant's brother, and defendant. In the photos, defendant is wearing blue jeans, a black shirt, and a San Francisco "49ERS" hat. The hat was black with a red and white logo, a red brim, and a red band in the back. In two photos, defendant appears to be wearing earrings. Defendant also appeared to be wearing red shorts with a black stripe under his pants.

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[1] We ordered the record augmented to include the photos.

After about an hour, the accomplice drove the group to the victim's house. The accomplice was told to park in an alley behind the house. Ryan (who was the ex-boyfriend of one of the victim's housemates) went inside.

The accomplice waited in the car. Soon, Kenny, defendant, and defendant's brother got out of the car and walked toward the front of the house. They came back sometime later.

Kenny got back in the car, but defendant and his brother walked back toward the front of the house. They were gone for 20 to 30 minutes. The accomplice saw Kenny was on his phone.[2] At some point the accomplice heard a gunshot.

The accomplice then saw Ryan, defendant, and defendant's brother run back to the car and he drove off. On the way home, he heard defendant's brother say, "Oh, shit. I think Bra got shot."

The Victim's Girlfriend

The girlfriend of the murder victim testified. She lived with the victim, along with her daughter, her sister (Ryan's ex-girlfriend), and her sister's daughter. The victim sold marijuana and kept it in the house.

Ryan had shown up early in the afternoon and spent several hours hanging out with the girlfriend's sister. At 8:40 p.m., the girlfriend was in the bathroom getting ready for work. The sister and the daughter were also in the bathroom; Ryan was standing in the doorway of the bathroom.

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2 Kenny was exchanging numerous text messages with Ryan, who was inside the house, including, Kenny: "Try and keep them all in one room"; Ryan: "The roommate just walked out"; Kenny: "All right. Where the kid's at"; Ryan: "Living room wit [Ryan' ex-girlfriend] and me I think [the victim's] going to leave. He going to bust a move. He going to go skating"; Kenny: "So when you want niggas to come in."

The girlfriend heard Ryan say, “Oh, shit.” She then saw two robbers rush in saying, “[G]et on the ground.” She pulled her daughter into the bathroom and shut the door. At one point, one of the robbers appeared to fall through the door to the bathroom, and she briefly glimpsed black bottoms made of a silky “basketball shorts type of material.”

One robber had a gun and wore a hat, along with something covering his face. He appeared to be about five feet eight inches tall and looked “a little bit thicker built, not heavy, but not really skinny.” She saw his arm holding the gun as it fired. She closed the door to the bathroom. A minute later she came out of the bathroom to find the victim bleeding. She called 911.

She did not get a view of the other robber. And she last saw Ryan when he was standing in the hallway and never saw him after that.

After the incident, she described the robber to a responding officer as a Black male, 6 feet 1 or 2 inches tall and “maybe 230 pounds. I have no idea.”[3] He was wearing a red hat with a white symbol, black shorts, black pants, and a red bandanna covering his face. Later, when the girlfriend was shown a photo lineup, she picked the photo of Kenny.

The Victim’s Friend

A friend of the victim also testified. He and the victim were coming back to the house from skating. They parked in front of the house and the victim walked inside first. The friend heard the victim say, “What the fuck?” and saw him struggling as he tried to push the two robbers out the back door. The friend hid in a closet, and five to ten seconds later he heard a “pop.”

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[3] When defendant was arrested he was 5 feet 8 inches tall and weighed 225 pounds. His brother was 6 feet 1 inch tall and weighed 175 pounds.

Both robbers were Black. One robber had a shirt over his face and a red sports cap. The cap may have had a "49ERS" logo on it, but the friend was "not a hundred percent sure." He described the robber's height as 5 feet 9 inches, and weight as skinny, "maybe about 145, 160." The robber wore blue or black jeans. And he "maybe" wore stud earrings. The other robber was taller and had a ski mask on. Both robbers had guns.

Objection to Accomplice Testimony

At trial, the defense objected, arguing insufficient evidence corroborated the accomplice's testimony. Defense counsel's oral motion referencing Penal Code section 1111 was denied by the trial court.[4] It noted that in the photos defendant wore a hat with a red bill and the San Francisco "49ERS" logo on it. He also wore jeans. Defendant appeared bigger than the other men in the photos. And two hours before the robbery, defendant was in Manteca, 75 miles away from his home, with the four other men. The court noted, although there were inconsistencies between the victim's girlfriend's and friend's estimate of the robber's weight, the accomplice's testimony was sufficiently corroborated.

Jury Verdict and Sentencing

The jury found defendant guilty of first degree murder (§ 187). As to that count, it found true the special circumstances that defendant committed the murder during an attempted robbery and during a burglary (§ 190.2, subd. (a)(17)(A), (G).) It also found defendant had personally used a firearm. The jury, however, found not true that defendant personally discharged a firearm.

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4 Undesignated statutory references are to the Penal Code.

The jury also found defendant guilty of burglary and robbery with accompanying enhancements.

Due to the special circumstances finding the murder was committed during an attempted robbery (§ 190.2, subd. (a)(17)(A)), the trial court imposed a life-without-the-possibility-of-parole sentence.

DISCUSSION

I

Accomplice Testimony

On appeal, defendant contends insufficient evidence corroborates the accomplice's testimony. He argues that absent that testimony, there is no evidence he went from the Bass Pro Shops to the victim's house. He reasons the testimony regarding the robber's weight is too muddled to provide sufficient corroboration. And nothing about the hat was sufficiently distinctive to assure it was the same as the one in the photos—and hats can be passed from person to person. He also notes the girlfriend selected a photo of Kenny in the lineup. And he avers there is a real risk the accomplice invented the notion defendant went into the house, to protect his friend Kenny and possibly himself. We disagree.

A conviction cannot rest on an accomplice's testimony absent corroborating evidence that tends to connect the defendant to the crime. (§ 1111.) Corroborating evidence must do more than show the commission of the crime or its circumstances. (*Ibid*.) It must tend to implicate the defendant and relate to some act or fact that is an element of the crime. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) But it need not establish every element of the crime. (*Ibid.*) And it may be circumstantial, slight, and entitled to little consideration standing alone. (*People v. Valdez* (2012) 55 Cal.4th 82, 147.) Corroborating evidence " ' " 'is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.' " ' " (*Id.* at p. 148.)

On appeal, the fact finder's determination on the issue of corroboration is binding on us, " 'unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' " (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

Here, sufficient evidence corroborates the accomplice's testimony. The victim's girlfriend described the armed robber she saw as 5 feet 8 inches tall and "thicker built." To a responding officer, she described him as "maybe 230 pounds," wearing a red hat with a white symbol. She also saw him wearing black basketball shorts under his pants. The victim's friend similarly described the armed robber as 5 feet 9 inches tall, wearing blue or black jeans. And he possibly wore stud earrings, and his hat may have had the "49ERS" logo on it.

Those descriptions of the robber with a gun match defendant's height and weight when he was arrested: 5 feet 8 inches tall, weighing 225 pounds. They also largely match his appearance in the photos, where he wears a "49ERS" hat with a red rim, blue jeans, and possibly earrings. Further, the photos place defendant out of town, near the victim's home, and in the presence of others involved in the robbery, shortly before the robbery.

Defendant, however, points to discrepancies and inconsistencies in the witnesses' descriptions. He also questions the distinctiveness of the hat and notes its transferability. But while those points could certainly be used to challenge the evidence before a jury, for purposes of accomplice corroboration, the evidence is at least "circumstantial" and "slight," evidence that tends to implicate defendant in the robbery.[5] (*People v. Valdez, supra,* 55 Cal.4th at p. 147 ["Corroborating evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone"].)

Defendant also argues the victim's girlfriend's and the friend's descriptions do not provide corroboration because the jury found the personal discharge of a firearm allegation not true, implicitly rejecting their testimony. Defendant is mistaken. "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict." (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) Indeed, nothing in the record causes us to conclude the not true finding undermines the jury's implied finding that corroborating evidence supported the accomplice testimony.

In sum, the accomplice testimony was sufficiently corroborated.

II

The Special Circumstances Findings

Defendant contends the special circumstances findings must be set aside. He reasons that for an aider and abettor of a felony murder to be held accountable under a special circumstances finding, the prosecution must prove the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. He argues that because the jury found not true that he personally discharged a firearm in the offense, the jury must have found him guilty of murder as an aider and abettor. And, he maintains, the facts are insufficient to support a special circumstances finding for an aider and abettor. We disagree.

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5 Further, that the girlfriend selected Kenny in the photo lineup is not troubling given each of the robbers wore something covering his face.

As relevant here, for a special circumstances finding giving rise to a death or life-without-the-possibility-of-parole sentence, a nonkiller defendant must have exhibited "major participation in the felony committed, combined with reckless indifference to human life." (*People v. Banks* (2015) 61 Cal.4th 788, 800, 804 (*Banks*), citing *Tison v. Arizona* (1987) 481 U.S. 137, 158 [95 L.Ed.2d 127, 145].) In reviewing a challenge to the sufficiency of the evidence to support a true finding of special circumstances, we ask whether from the evidence, viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements beyond a reasonable doubt. (*Banks,* at p. 804.)

Here, sufficient evidence supports the special circumstances finding. Preliminarily, the linchpin of defendant's argument is that because the jury returned a not true finding on the personal discharge allegation, it must have found he was an aider and abettor. Not so. A jury's not true finding on a gun discharge allegation does not necessarily demonstrate it has based a murder verdict on an aider and abettor theory. (*People v. Thompson* (2010) 49 Cal.4th 79, 120 ["The jury's finding on the gun use allegation does not necessarily demonstrate it based its murder verdict on an aider and abettor theory"]; *People v. Price* (2017) 8 Cal.App.5th 409, 452-453 ["In evaluating whether there was sufficient evidence to support the special circumstance finding, we disregard the jury's findings on the personal use allegations and consider all of the evidence presented to the jury regarding [the defendant's] role in the murder, including the evidence indicating [the defendant] was the actual shooter"].) On this record, the jury could have reasonably found special circumstances based on defendant being the robber who shot and killed the victim.

Even assuming defendant was an aider and abettor, overwhelming evidence supports a finding he was a major participant and acted with reckless indifference to human life. (See *Banks, supra,* 61 Cal.4th at pp. 800, 804.)

In considering whether a defendant was a major participant, the "ultimate question" is " 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major." ' " (*People v. Clark* (2016) 63 Cal.4th 522, 611 (*Clark*).) Among the relevant factors in determining major participation are: " 'What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used?' " (*Ibid*.)

The factors for determining reckless indifference to human life, in turn, significantly overlap. Indeed, " 'the greater the defendant's participation in the felony murder, the more likely that he [or she] acted with reckless indifference to human life.' " (*Clark, supra,* 63 Cal.4th at p. 615.) The factors can include, whether the defendant knew a gun would be used or personally used one? Whether the defendant was physically present at the scene, and therefore provided with an opportunity to restrain the murderer or aid the victim? The duration of the felony. Whether the defendant knew his or her cohort's likelihood of killing? And whether the defendant took steps to minimize the risk of violence? (*Id*. at pp. 618-622.)

To this, defendant maintains he was not properly found to have qualified for special circumstances. He avers there is no evidence he was involved in planning the robbery or procuring the guns. He was not friends with the other participants, other than his brother, and did not know their violent tendencies. He had no reason to expect the robbery would erupt into shooting. He had no opportunity to prevent the murder. And nothing he did after the shooting shows he had reckless indifference to human life. Defendant is mistaken.

The evidence squarely demonstrates defendant's major participation in such criminal activities. (*Banks, supra,* 61 Cal.4th 788.) As to the ultimate question — was defendant's participation sufficiently significant to be considered major? — defendant was one of the two armed robbers to enter the victim's home. (See *People v. Medina* (2016) 245 Cal.App.4th 778, 792 ["Unlike [the defendant] in *Banks,* Medina was not simply a getaway driver . . . , he was 'actively involved in every element of the [attempted robbery] and was physically present during the entire sequence of criminal activity culminating in the murder . . . and the subsequent flight' "]; *Tison v. Arizona, supra,* 481 U.S. at p. 158 [finding substantial personal involvement where each defendant was actively involved in every element of the kidnapping–robbery and was physically present during the entire sequence of criminal activity culminating in the murder and subsequent flight].)

Further, defendant was at the scene of the shooting and reasonably in a position to facilitate or prevent the murder. He used one of the two guns involved in the robbery. After lethal force was used, he did not render aid but left with his cohorts. And though defendant denies knowledge of the other participants, the evidence indicates the other robber (the other key participant) was his brother.[6]

The evidence also demonstrates reckless indifference to human life. As one of the two armed robbers, defendant played a principal role in the robbery. (See *Clark,* 63

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6 That the brother was the other robber is deduced by the evidence that, of the five robbers, the accomplice and Kenny were in the car, and Ryan was in the victim's house with the victims, leaving defendant and his brother as the masked robbers. That the brother said, "Oh, shit. I think Bra got shot," on the way home, bolsters that conclusion.

Cal.4th at p. 615 [" 'the greater the defendant's participation in the felony murder, the more likely that he [or she] acted with reckless indifference to human life' "].) Defendant knew a gun would be used — indeed he wielded one.[7] (See *Clark*, supra, 63 Cal.4th 522, 618 ["A defendant's *use* of a firearm, even if the defendant does not kill the victim or the evidence does not establish which armed robber killed the victim, can be significant to the analysis of reckless indifference to human life"].) He was physically present at the scene, and assuming his brother was the shooter, he was close enough to restrain him. Again, to the extent the brother had a propensity for violence, defendant was positioned to know of it. And nothing indicates defendant took steps to minimize the risk of violence. Indeed, the fact the shooting happened during a struggle and afterwards defendant's brother said, "Oh, shit. I think Bra got shot" establishes that at least one gun was loaded and suggests the safety was off.

In sum, the jury could reasonably conclude defendant was the actual shooter, and if it did not, substantial evidence supports a finding he was an aider and abettor in that he was a major participant and acted with reckless indifference to human life.

III

The Abstract Must Be Corrected

Finally, the parties agree the abstract must be corrected to remove an erroneously included $1,000 surcharge. We agree.

At sentencing, the trial court imposed a $10,000 restitution fine. The abstract of judgment, however, reflects—in addition to that fine—a $1,000 surcharge that was never orally imposed. We will direct the trial court to prepare a corrected abstract reflecting removal of that surcharge. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["An

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[7] Both the victim's girlfriend and the victim's friend testified the robber wearing the red hat had a gun.

abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment"].)

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment removing the $1,000 surcharge. It is further directed to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
MURRAY, Acting P. J.

/s/
DUARTE, J.